

ATTACHMENT A

[Letter from Mr. Haji Jameel to VTA dated March 14, 2003,
requesting an application]

STATE OF CALIFORNIA

PUBLIC UTILITIES COMMISSION

5 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



March 14, 2003

File No.183-43

Jeff Funk
Deputy Director Highway Construction
Valley Transportation Authority
3331 North First Street, Building B
San Jose, CA 95134

RE: U.S. 880 WIDENING OVER VTA TRACKS ON NORTH FIRST STREET IN
SAN JOSE

As the agency responsible for safety oversight of rail crossings in the State of California, as stated in California Public Utilities Code Sections 1201-1205, the Commission requires that the Valley Transportation Authority file an application, as described in Rule 39 of the Commission's Rules of Practice and Procedure, for the above-mentioned project.

Please send a written response to this request by March 28, 2003. The short response time is due to the advanced state of construction of the project observed in a recent inspection. If you have any questions in this matter, please call Kevin Boles at (650) 703-2795.

Very truly yours,

A handwritten signature in black ink, appearing to read "Haji Jameel", with a long horizontal line extending to the right.

HAJI JAMEEL
Supervising Transportation Engineer
Consumer Protection and Safety Division

ATTACHMENT B

**[Letter from Benjamin H. Scharf, Senior Assistant Counsel for VTA
to Richard W. Clark, Director of Consumer Protection and Safety Division
dated March 27, 2003, refusing to file an application]**



March 27, 2003

Writer's Direct Line 408-321-7556

Richard W. Clark, Chief
Consumer Protection and Safety Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102

Re: Caltrans I-880 Widening Project
VTA Guadalupe Corridor LRT Line
CPUC request for application

Dear Mr. Clark:

This is a response to a letter of March 14, 2003, sent by a member of your staff, requesting the Santa Clara Valley Transportation Authority (VTA) to file an application with the CPUC for safety review of a highway widening project, a portion of which is being constructed over VTA's light rail transit (LRT) line at North First Street in the Guadalupe Corridor (City of San Jose). A copy of that letter is enclosed for your convenience. For the reasons outlined below, VTA does not believe that it is legally required to file an application for CPUC safety approval for this construction. Practically speaking, the safety of this highway project, as it might affect the LRT line, is a matter under the supervision and control of the (California) Department of Transportation (Caltrans) and the Federal Highway Administration (FHWA). VTA is constructing this project under the direction of those agencies.

This demand for an application is based on Sections 1201-1205 of the Public Utilities Code, which provide the CPUC with exclusive jurisdiction over crossings of railroads and street railroad corporations and the tracks owned or operated by those public utilities. VTA is a public agency and the transit facilities in question are not the "tracks of a railroad (or street railroad) corporation". See §1219. Nonetheless, VTA agrees that the Commission has safety oversight jurisdiction over publicly-owned LRT systems, including their crossings, but that authority is properly exercised under §99152 which applies to a "public transit

Richard W. Clark, Chief
CPUC Consumer Protection and Safety Division
March 27, 2003
Page 2

guideway". Because that section applies only to the safety of publicly-owned transit facilities, it does not provide the CPUC with the same extensive regulatory authority it has over privately-owned transportation utilities, which have no other source of public regulation.

In this case, the public transit guideway is that portion of the Guadalupe LRT Corridor which passes under I-880. With the minor exception detailed below, no aspect of this highway construction project modifies the existing design, construction or operation of the LRT line. With respect to the LRT system, the only safety issue is whether the widened highway, part of an existing (and approved¹) grade-separated crossing, is of structural integrity sufficient to avoid collapsing on the underlying LRT tracks. This is a matter of structural safety of the highway, not the public transit guideway, and one which is under the total control of Caltrans. We simply do not see this construction as a modification of the grade-separated LRT crossing or one which has any effect on the safety of LRT operations at the crossing or in the corridor.

With due respect, the CPUC does not normally have regulatory supervision over highway construction and, in this case, a sister state agency has approved all the planning and engineering on the project and has retained on-site supervisory control. This, we submit, more than adequately protects the public from any risks to the safety of the LRT line which might remotely occur due to the highway widening. Review by the CPUC of this highway construction through VTA application would be redundant and needlessly tax limited public resources without a concomitant benefit to the public. The following documentation should support and amplify these conclusions.

Enclosed herewith is a copy of a Master Cooperative Agreement of May 4, 2000, between Caltrans and VTA, which sets forth rights and responsibilities as between the two agencies regarding construction of ten major highway projects. One of these projects is the widening of I-880 (from 4 to 6 lanes) between Montague Expressway and SR 101/North First Street. Under Streets and Highways Code §§114 and 115, all work performed under this cooperative agreement must be approved by Caltrans. A review of this agreement will indicate that Caltrans has complete control over all final engineering and construction and serves as the lead agency for environmental review under NEPA and CEQA. See pages 7 (para. 6,7,8), 8 (para. 12), 11 (Attachment A).

¹ See CPUC Decision 87-01-074 (January 28, 1987) (copy enclosed) for Application 85-04-040 (Application of the Santa Clara County Transit District for an order authorizing ... construction under the State Route 17 structure by the new Light Rail Transit Line of the Guadalupe Corridor Project in the City of San Jose, California.). The construction undertaken by VTA and Caltrans makes no significant changes in the project described in this application and decision.

Richard W. Clark, Chief
CPUC Consumer Protection and Safety Division
March 27, 2003
Page 3

Environmental clearance and design of Program will meet established State [Caltrans] engineering practices.

...

All work described herein, whether accomplished by State or VTA, will be developed in accordance with policies, procedures, practices, standards, and regulations that apply to State.

...

The preparation of environmental documents and design for Program shall be performed in accordance with State's standards and practices current as of the date of execution of this Agreement. Any exceptions to applicable design standards shall be approved by State via the processes outlined in State's Highway Design Manual and appropriate memorandums and design bulletins published by State. ... State shall consult with VTA in a timely manner regarding effect of proposed and/or required changes on Program. During construction, any changes to improve safety or related improvements and any costs associated with such changes, shall be mutually agreed upon between State and VTA.

...

Oversight of project designs under Program involves State providing policy and procedural directions to State or non-State organizations or firms performing preparation of plans, specifications, and estimates for projects on the State Highway System. ... Oversight includes plan review and approval, and providing readily available plan, report and technical data as well as manuals and other guidelines. It shall also include review, guidance, and approval that may be provided at the site of the design work in addition to other reviews within State. The oversight of design is to ensure compliance with applicable State and Federal regulations....

Master Cooperative Agreement, page 7, paragraphs 6,7,8; page 11 (Attachment A) (emphasis supplied).

Enclosed herewith is a copy of a Construction Cooperative Agreement of April 5, 2001, between Caltrans and VTA, which sets forth rights and responsibilities specific to the construction of the I-880 widening project. A review of this agreement will demonstrate a comprehensive program of planning and design, including environmental review, which is totally controlled by

Richard W. Clark, Chief
CPUC Consumer Protection and Safety Division
March 27, 2003
Page 4

Caltrans and FHWA. Pursuant to §100115.5(b)(1) in VTA's enabling act, this agreement authorizes VTA to use designated tax funds for "the construction and improvement of state highways". (Paragraph 5) This is not an LRT project. The bridge widening over the Guadalupe Corridor tracks at North First Street will not change the operation of that system and its design and construction has been fully regulated by Caltrans.

[VTA agrees] to construct Project in accordance with plans and specifications of VTA, to the satisfaction of and subject to the approval of State.

...
[VTA agrees] construction within the existing or ultimate State right of way shall comply with the requirements in State's Standard Specifications and Project Contract Documents, and in conformance with methods and practices specified in State's Construction Manual, Falsework Manual, and Trenching and Shoring Manual.

...
[State agrees] to provide, at no cost to VTA, a qualified State representative who shall have authority to accept or reject work and materials or to order any actions needed for public safety or the preservation of property and to assure compliance with all provisions of the encroachment permit(s) issued to VTA and to VTA's contractor. State representative shall coordinate with VTA's resident engineer.

...
All changes affecting public safety or public convenience, all design and specification changes, and all major changes as defined in States Local Programs Manual ... shall be approved by State in advance of performing the work.

Construction Cooperative Agreement, page 3, paragraphs 4,6; page 7, paragraph 2; page 9, paragraph 10 (emphasis supplied).

A review of these two cooperative agreements will also demonstrate that environmental review requirements under CEQA and NEPA have been fully satisfied. Master Cooperative Agreement at 7, 8, 11; Construction Cooperative Agreement at 5, 6, 9. For environmental review, Caltrans and FHWA were the lead agencies and VTA was the responsible agency. Enclosed herewith is a copy of the Negative Declaration (February 23, 2001) and FONSI (February 26, 2001), issued by Caltrans and FHWA, respectively. Also enclosed is a copy of the face page, tables and project description (page 6) of the Initial Study/Environmental

Richard W. Clark, Chief
CPUC Consumer Protection and Safety Division
March 27, 2003
Page 5

Assessment issued on this highway widening project by those two agencies on December 2000. As evidenced by an Acknowledgement of Receipt (copy enclosed), the State Clearinghouse distributed a copy of that environmental document to the CPUC and other State agencies on or about December 20, 2000. My copy of the EA does not reveal any comments filed by the CPUC during the review period ending January 12, 2001 (see page 65, enclosed).

Enclosed herewith is a copy of the memorandum submitted to and adopted by the VTA Board of Directors on April 5, 2001. It indicates that the VTA Board approved execution of the Construction Cooperative Agreement (for the I-880 project) with the understanding that Caltrans "will perform an oversight role". The funding source is the 1996 Measure B Highway Program.

Also enclosed for your information are a series of design plans for the widening of the freeway bridge at North First Avenue. The plans are as follows:

- Sheets # 116 through 123 depict modifications to the LRT Overhead Contact System (OCS) to accommodate the bridge widening construction and additional bridge column construction between the LRT tracks.
- Sheets #447 through 461 depict the bridge widening construction design details.
- The three revised design sheets are from a contract change order to revise the OCS design plans.

These plans were all generated by Caltrans and indicate the extent of the construction. Upon request, VTA can provide additional plans and specifications for this construction.

As mentioned earlier in this letter, the only modification to the LRT system was the replacement of a pole and repositioning of a bracket for the overhead catenary as it passes under the freeway bridge. The clearances from other structures and the ground are unchanged. Enclosed are plans and an attached narrative indicating this sole structural change to the LRT guideway. Operational changes were and are limited to LRT service interruptions to accommodate construction activities below the bridge and around the tracks. A description of those service reductions can be found on the change-order plans. As also noted on the plans, the OCS modification followed established construction standards for LRT systems were approved by Caltrans.

///

Richard W. Clark, Chief

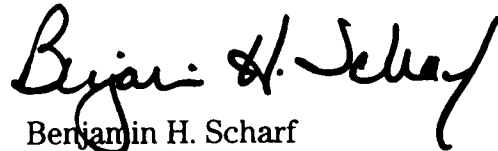
CPUC Consumer Protection and Safety Division

March 27, 2003

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Considering this history, the nature of the construction and the fact that this is a publicly-owned light rail system, VTA believes this is a highway project which does not affect the safety of the public transit guideway and has been otherwise regulated and supervised by State and Federal agencies competent in this area. Accordingly, VTA will not be submitting an application in this matter. If further discussion or additional information is needed, please contact me at your convenience.

Very truly yours,



Benjamin H. Scharf
Senior Assistant Counsel

Enclosures

cc: Paul Mai, Office Chief, Caltrans
Khoi Khau, Senior Transportation Engineer,
Federal Highway Administration
(both without enclosures)

ATTACHMENT C

**[Letter from Lionel B. Wilson, Acting General Counsel of the Commission
to Mr. Scharf dated May 2, 2003, directing VTA to file an application
or cease construction of the overpass]**

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



May 2, 2003

SBG	RAK
KDA	BHS
FJS	
File:	RDA

MAY 11 11 00 AM '03

File No.183-43

BENJAMIN H. SCHARF
Senior Assistant Counsel
Valley Transportation Authority
3331 North First Street
San Jose, CA 95134-1906

**SERVICE BY FACSIMILIE COPY
AND U.S. POSTAL SERVICE**

RE: I-880 Widening Project

Dear Mr. Scharf:

This letter is in response to yours of March 27, 2003, stating that the Santa Clara Valley Transportation Authority (VTA) will not file an application to the Commission for approval of the above-mentioned freeway widening over VTA's Guadalupe Line on North First Street. Staff's position remains that no grade-separated highway-rail crossing shall be modified without the Commission's approval. The Commission has the exclusive power to prescribe the manner of the crossing alteration. (See Cal. Pub. Util. Code §1202 (b).)¹ Therefore, we require that VTA file a formal Application with the Commission to obtain approval for the expansion of the I-880 overcrossing.

Your letter mentioned that our "sister state agency", the California Department of Transportation (Caltrans), is "handling" the state safety oversight for the project, but Caltrans routinely applies for approval from the Commission for all of their projects involving rail crossings. You also note that Caltrans is the lead agency for the project under CEQA and NEPA. Unfortunately, this does not relieve the Commission of its duty to review all environmental impact statements/reports as the responsible agency under CEQA.

The Commission's Rule 39 specifically requires an application for approval to widen an existing crossing. Because construction has already begun, we require that VTA submit an application to the Commission's Docket Office no later than May 25,

¹ See the Commission's finding of jurisdiction over VTA rail crossings in D.02-12-053, 2002 Cal. PUC LEXIS 884, December 17, 2002.

Letter to Benjamin H. Scharf
May 2, 2003

2003, or cease all construction activities and desist from further construction at this site until such time as the Commission permits you to complete the proposed project. If you have any questions in this matter, please call me at (415) 703-1642.

Very truly yours,



Lionel B. Wilson
Acting General Counsel

LBW:jmc

cc: William Ahern, Executive Director
Richard W. Clark, Director, Consumer Protection and Safety Division
Zee Wong, Program Manager, Safety & Reliability Branch
Vahak Petrossian, Prog. Mgr., Rail Safety & Crossings Branch
Robert L. Strauss, Prog. & Project Supervisor, Rail Transit Safety Section
Haji Jameel, Supervising Engineer, Rail Crossings Engineering Section
Kevin Boles, Utilities Engineer

ATTACHMENT D

**[Letter from Benjamin H. Scharf of VTA
to Lionel B. Wilson dated May 27, 2003,
refusing to file an application]**



May 27, 2003

Writer's Direct Line 408-321-7556

Via Fax Transmission
and
First Class Mail

Lionel B. Wilson, Acting General Counsel
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102

Re: Caltrans I-880 Widening Project
VTA Guadalupe Corridor LRT Line
Over-extension of CPUC safety oversight jurisdiction

Dear Mr Wilson:

This is a response to your letter of May 2, 2003, which repeats the demand of CPUC staff that VTA file an application for CPUC approval of construction of that portion of the Caltrans I-880 widening project which crosses over VTA's light rail tracks in the Guadalupe Corridor. As before, the CPUC bases this demand upon its belief that it has "exclusive power to prescribe the manner of the crossing alteration" under § 1202.¹

There is nothing stated in your letter which changes our view that the CPUC has only safety oversight jurisdiction over publicly-owned light rail systems, including their crossings, and that the statutes cited in support of the CPUC's position apply only to those crossings of investor-owned railroad and street railroad corporations. § 1219. Extensive legal memoranda on these points have been submitted to the Commission and the issues are now before the Court

¹ Citing CPUC Rule of Practice and Procedure 39 does not support jurisdiction over a publicly-owned LRT system. Under the State Constitution, all such jurisdiction is based upon an express grant of statutory authority. Rule 39 is not a statute, but adopted pursuant to §§ 1201-1205, which, under § 1219, are expressly applicable to investor-owned railroad and street railroad corporations. The CPUC cannot rely upon a procedural rule as a source of jurisdiction.

Lionel B. Wilson, Acting Gen'l Counsel
California Public. Utilities Comm.
Page 2

of Appeal for the Sixth Appellate District. I have no intention to re-argue VTA's legal position in this response. However, there are points raised in your letter which should be answered.

As a threshold matter, it is settled law that an administrative or regulatory agency is not entitled to an application for its approval of activities over which it has no jurisdiction. *Abelleira v. The District Court of Appeal*, 17 Cal.2d 280, 288 (1941). If the agency has no subject matter jurisdiction, it makes no difference whether an application is filed because the agency has no authority to approve or deny it. *Buckley v. California Coastal Commission*, 68 Cal.App.4th 178, 190 (1998). As repeatedly stated in earlier correspondence and briefing, the CPUC's jurisdiction over LRT systems, including their crossings, is limited to safety oversight under § 99152. Jurisdiction under §§ 1201 or 1202 is far more extensive than that needed for safety oversight. If these tracks were the "tracks of a railroad corporation" or if VTA was a "street railroad corporation", under § 1219 the Commission would have the exclusive authority to "prescribe the manner of the crossing alteration" as asserted in your letter. Because these are publicly-owned light rail tracks and VTA is not an investor-owned street railroad corporation, the CPUC's jurisdiction over this crossing is limited to safety oversight under §§ 99152 and 100168.

Regarding the instant highway-widening project, we know that Commission staff has visited the work site and we have supplied the Commission with plans which fully illustrate the physical relation of the highway widening project to the existing grade-separated LRT tracks below. In relation to the LRT tracks, the primary safety issue of this highway project is the structural integrity of the widened highway platform. We view this matter to be under the exclusive jurisdiction of Caltrans and would be surprised if the Commission is seriously seeking to substitute its judgment on bridge construction for that state agency. The only modification to the LRT system at this crossing is the change of a catenary support. This is a de minimis change and, in our view, raises no substantial safety issues worthy of a formal safety application under § 99152, much less one for full construction approval under § 1202.

This project is very near completion. After site visits and review of the construction plans, if Commission staff has any doubts as to the public safety of this new construction, we would expect immediate notification of any such dangers! Of course any "stop work" demands would have to be founded upon such threats to public safety. VTA and Caltrans have extensively reviewed the safety of this project and do not know of any such flaws. At this juncture, all we have received are assertions of exclusive jurisdiction which we believe to be legally invalid and, absent even the slightest indication of unsafe design or

Lionel B. Wilson, Acting Gen'l Counsel
California Public. Utilities Comm.
Page 3

construction, we can see no reason to even consider halting construction of a costly and important project.

Citing CPUC Decision 02-12-053 in support of this jurisdiction is especially ironic.² As you know, this decision is now before the Court of Appeal under grounds similar, but not identical, to those presented by this highway widening project. Sixth Appellate District No. H025882 (filed 4/29/03). VTA's petition for an alternative writ was filed because the Commission had not issued a rehearing decision in over 90 days and staff was continuing to assert jurisdiction under §§ 1201 *et seq.* Through a stipulation with VTA, your own office obtained an abatement of this petition to allow a rehearing decision. On May 22, 2003, rehearing Decision 03-05-081 was issued which, because it continues to assert jurisdiction under § 1202, will be brought to the Court of Appeal through an amendment or refile of the original case. Thus, D.02-12-053 remains subject to review by the courts.

Because the CPUC is heavily insulated from judicial review, CPUC decisions which have not been affirmed by a fully-written appellate decision on the merits, have only the effect of *res judicata* and are not *stare decisis*. *Consumers Lobby Against Monopolies v Public Utilities Commission*, 25 Cal.3d 891, 902-905 (1979). Even a summary denial of a petition for review does not constitute a court decision which would stand as *stare decisis*. *Id.* Thus, compliance with a Commission order (as done in A.02-12-040) does not bar a jurisdictional challenge in a subsequent proceeding. "The doctrine of *stare decisis* applies only to judicial precedents, i.e., to the *ratio decidendi* or actual ground of decision of a case cited as authority." 25 Cal.3d at 902. The Commission's asserted jurisdiction under § 1202 has not been affirmed by any appellate court. Thus, unless and until an appellate court has finally ruled on the merits, the Commission's jurisdiction over LRT systems is subject to legitimate challenge in subsequent cases. The procedures for issuing and enforcing CPUC decisions, and opposing them on jurisdictional grounds, are clearly stated in the law.

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² Subsequent to D.02-12-053, VTA filed an application in proceeding A.02-12-040 for safety review of the aerial LRT crossing in question. That application reserved jurisdiction and is now being processed without protest by your staff.

Lionel B. Wilson, Acting Gen'l Counsel
California Public. Utilities Comm.
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A reading of the rehearing decision reveals, *inter alia*, the following statement:

[A]lthough the Commission's view of its safety jurisdiction is broader than VTA's, at no time has the Commission attempted to exercise full jurisdiction over VTA's system as VTA implies. Such full regulatory control would involve issues such as service and fares. The Commission's only interest is in issues relating to safety.
D.03-05-081, slip at 8 (emphasis supplied).

The Commission's current attempt to "prescribe the manner of the crossing alteration" – implying, of course, the exclusive right to determine the design and construction of this highway bridge – is well beyond a mere safety concern.

Another perspective on LRT safety jurisdiction is found in *Brown v. Santa Clara County Transportation Agency*, D.94-10-009, 56 CPUC2d 554, 558 (1994), a case on which the Commission heavily relies in its rehearing decision. In ruling that the operator of an LRT facility (the City of San Jose) was required to apply under § 99152 for CPUC safety review of new construction or modifications, the Commission noted that the operator "had the right to approve the mall design, require modifications, and perform final inspection of its facilities." *Id.* In answer to the City's concerns that all future changes to the mall would require prior CPUC approval, the Commission stated that prior review would be necessary "if the changes involve safety appliances or procedures of the public transit guideway, [but] our approval is not needed for other facilities or procedures." (emphasis supplied) *Id.* This is a far cry from asserting authority to "prescribe" the manner in which the I-880 highway platform is being widened. All safety issues reside in the design and construction of the bridge widening and that responsibility is clearly within the jurisdiction of Caltrans.

Your remark about environmental review is not understandable. As stated in earlier correspondence, this entire project has already undergone full environmental review, including the issuance of a FONSI on February 26, 2001 by the Federal Highway Administration. The Commission was listed and notified as a responsible agency. The time for CPUC participation in the environmental review process has long since passed. In Decision 02-05-047 at slip 12-13, the Commission acknowledged that, "it is not our duty to second-guess the lead agency" and that "alleged deficiencies should have been raised with the lead agency at the time the environmental documents were being considered, not at this late stage." (emphasis supplied)

Lionel B. Wilson, Acting Gen'l Counsel
California Public. Utilities Comm.
Page 5

Though we are willing to supply the Commission with any additional plans, data or reports already produced, and will consider formal notification of the bridge widening, VTA does not believe factual or legal grounds exist to require a formal application for Commission approval of this construction.

Very truly yours,


Benjamin H. Scharf
Senior Assistant Counsel

ATTACHMENT E

[Letter from Patrick S. Berdge, staff counsel,
to Jane P. Kennedy dated June 24, 2003, Chairperson of VTA
giving notice of pending enforcement action for failure to file
an application for widening the overpass]

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298



JUN 26 11 31 AM '03

June 24, 2003

File No.183-43

JANE P. KENNEDY, VTA Chairperson
Office of the Board Secretary
Santa Clara Valley Transportation Authority
3331 North First Street, Building B-2
San Jose, CA 95134-1927

	RAK
	BHS
	RDA

**RE: NOTICE OF PENDING ENFORCEMENT ACTION;
I-880 Widening Project Over VTA Line**

Dear Ms. Kennedy:

On May 2, 2003, the Commission's General Counsel sent VTA a cease and desist letter directing it to file an Application to widen the I-880 overpass over the VTA light-rail line or cease construction. VTA refused claiming, as it did in A.01-01-003, that California Public Utilities Code section 1201 et seq. does not apply to VTA. The filing of the Application is necessary for a number of safety and environmental reasons. As the responsible agency, the Commission must review relevant environmental impact concerns. With respect to safety, the Commission is concerned, among other things, with the falsework for the I-880 expansion that affects the VTA right-of-way.

The Commission staff requires that the VTA submit a formal Application for widening I-880 by July 9, 2003, over VTA's light-rail line pursuant to California Public Utilities Code section 99152.¹ Failure to do so will result in staff's filing an Order Instituting Investigation and an Order to Show Cause why sanctions should not be assessed against VTA for failure to file a formal Application demonstrating the

¹ Cal. Pub. Util. Code § 99152 provides in pertinent part: "Any public transit guideway planned, acquired, or constructed, on or after January 1, 1979, is subject to regulations of the Public Utilities Commission relating to safety appliances and procedures. The commission shall inspect all work done on those guideways and may make further additions or changes necessary for the purpose of safety to employees and the general public."

safety of the work to widen the VTA/I-880 overpass and for refusing to comply with the earlier cease and desist letter. The OII/OSC proceeding will be separate from A.01-01-003, and shall be heard in the Commission's headquarters at 505 Van Ness Avenue, San Francisco, California.

Very truly yours,



Patrick S. Berdge
Staff Counsel

PSB:jmc

cc: William Ahern, Executive Director
Lionel B. Wilson, Acting General Counsel
Richard W. Clark, Director, Consumer Protection and Safety Division
Jason Zeller, Assis. Gen. Counsel, Consumer Protection and Safety Division
Zee Wong, Program Manager, Safety & Reliability Branch
Vahak Petrossian, Prog. Mgr., Rail Safety & Crossings Branch
Robert L. Strauss, Prog. & Project Supervisor, Rail Transit Safety Section
Benjamin H. Scharf, Senior Assistant Counsel
Santa Clara Valley Transportation Authority
3331 North First Street
San Jose, CA 95134-1906

ATTACHMENT F

**[Letter from Benjamin H. Scharf of VTA
to Patrick S. Berdge dated July 7, 2003,
refusing to file an application]**



July 7, 2003

Writer's Direct Line 408-321-7556

Via Fax Transmission
and
First Class Mail

Patrick S. Berdge, Staff Counsel
Rail Crossings and Engineering Section
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102-3298

Re: Caltrans I-880 Widening Project
VTA Guadalupe Corridor LRT Line
Staff demand for application
Proposed Order Instituting Investigation

Dear Mr. Berdge:

On behalf of the Chair of the VTA Board of Directors, this is a response to your letter of June 24, 2003. The letter is the third in a series of staff demands that VTA file an application for CPUC approval of that portion of the Caltrans I-880 widening project which crosses over VTA's light rail tracks in the Guadalupe Corridor. If an application is not filed by July 9, 2003, staff will request the Commission to issue an Order Instituting Investigation. If the Commission orders an investigation, we presume one will be conducted under §§¹ 1701.1(c)(1), 1701.4 and CPUC Rule of Practice and Procedure 14. Albeit without citation of authority, the letter also threatens sanctions for VTA's refusal to comply with prior staff demands.

Unfortunately, the letter does not speak to VTA's two prior responses, which explain the jurisdictional and factual reasons for VTA's refusal to file an application on this project. Therefore, to assist the Commission in its decision on whether to proceed with an investigation of this matter, we are enclosing copies of those two responses (March 27 and May 27, 2003), which we expect will be presented to the Commission in its executive consideration of any proposed OII.

¹ All "§" references are to the Public Utilities Code.

Patrick S. Berdge, CPUC Staff Counsel

July 7, 2003

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In view of this past dialogue, the most understandable response to this current demand is categorical.

1. Jurisdiction: Under which statute is the CPUC now demanding an application: § 1202 or § 99152?

The "cease and desist letter" to which you refer is a letter of May 2, 2003, sent by the Commission's acting general counsel - not a Commission order - which demanded an application "for approval for the expansion of the I-880 overcrossing" or that construction be stopped as of May 25, 2003. Going past the question of whether any Commission official has the authority to order a public agency to stop construction, that "cease and desist" letter was completely based on jurisdiction under § 1202. The letter made no mention of safety concerns, but asserted the Commission's "exclusive power to prescribe the manner of the crossing alteration." (emphasis added)

On May 27, 2003, VTA responded to that "cease and desist" letter by explaining that, because the Commission did not have such "exclusive" subject-matter jurisdiction over LRT crossings under § 1202, it did not have the power to compel an application under that statute. We even went further. We explained to the Commission that § 99152 did provide a level of safety oversight authority over "public transit guideways". However, this is a bridge construction project and the nature of the work did not implicate safety concerns for the "design, construction and operation" of the "public transit guideway". With the *de minimus* exception of a relocated catenary bracket, we explained that nothing was physically changed on the LRT corridor and that the bridge expansion will not affect LRT operations. In that Caltrans has approved the design and continues to oversee our construction of the bridge widening, the safety of that work is also beyond subject-matter jurisdiction of the CPUC.

The "cease and desist" letter did not limit itself to LRT safety oversight jurisdiction under § 99152. It demanded an application under full CPUC regulatory jurisdiction over the crossings of railroad and street railroad corporations under § 1202. VTA maintains its objection to that level of jurisdiction and will not file an application as demanded in that letter. In contrast, your most recent letter shifts the CPUC's jurisdictional posture. With only a passing reference to § 1201 *et seq.*, staff now demands an application under § 99152 "demonstrating the safety of the work to widen the VTA/I-880 overpass". (emphasis added) Thus, this current letter is really the first "cease and desist" letter mentioning "safety" under § 99152.

With respect to safety, the Commission is again referred to the project description and remarks contained in VTA's two earlier responses. The highway bridge was widened no more than 18 feet over the LRT tracks and creates no safety threat to the guideway. The only significant safety issue is whether the bridgework has sufficient structural integrity to avoid collapsing on the LRT tracks. Commission staff has visually inspected the project and has been shown detailed construction plans of the bridge widening. We have heard nothing from staff regarding the affect of the bridge widening on the design, construction or operation of this portion of the guideway which would justify the time and expense to prepare and review a "safety" application. Removal of the "falsework", to which your letter refers (i.e., the temporary wood construction supports), commenced in March 2003 and was completed in late June 2003.

Though the CPUC has safety oversight jurisdiction regarding LRT guideways, compelling an application to review *de minimus* or nonexistent changes would be an abuse of its discretion. Compelling an application which covers work beyond its subject-matter jurisdiction would be unlawful.

2. Sanctions: Under what statute(s) can the CPUC impose sanctions upon a public agency?

Under the State Constitution, the CPUC acquires jurisdiction over public agencies through express legislation and, under its enabling legislation, VTA is a public agency. Your current letter includes, for the first time in this dialogue, a threat of sanctions against VTA for not filing an application and for refusing to comply with the "cease and desist" letter. We can find no authority to support such CPUC action.

In a review of the enforcement and violations sections of the Public Utilities Code, § 2100, *et seq.*, a penalty or fine can be based only upon violation of a Commission order or decision. We cannot find authority for any sanction based upon refusal to comply with a staff directive. Most of these "violations" statutes apply to investor-owned public utilities, which are subject to full CPUC regulation. For purposes of quasi-criminal penalties, safety oversight jurisdiction does not convert VTA into a public utility. Sections 2111, 2112 and 2113 allow for court-imposed sanctions against non-utilities or their agents, but apply only to "persons" or "corporations". VTA is neither. Public agencies, such as cities, counties or special districts (like VTA) have not been made subject to these penalties. Being quasi-criminal statutes, these sections are interpreted strictly against the government or enforcement agency. With this review in mind, we would expect any further threats of sanctions to be supported by specific statutory authority.

Up to this point, CPUC staff has demanded an application under § 1202, which has been refused on jurisdictional grounds. Interpreting the current demand for an application as based solely upon safety jurisdiction under § 99152, VTA has no reason to believe the bridge-widening will have any effect upon the safety of the LRT corridor. With the exception of the "falsework" remark, staff has not referred to any aspect of this easily-understood project which might create a safety hazard. In the absence of any specific safety concerns, VTA will not file an application over a construction project which is largely, if not entirely, outside the Commission's subject-matter jurisdiction.

Very truly yours,


Benjamin H. Scharf
Senior Assistant Counsel

encls.

cc: Lionel B. Wilson, CPUC Acting General Counsel (w/o encls.)
Paul Mai, Office Chief, Caltrans
Khoi Khau, Senior Transportation Engineer
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(both with enclosures)